

UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re)	Case No. 97-03746
)	Chapter 11
UPLAND PARTNERS,)	
)	Re: Docket No. 3245
Debtor.)	
_____)	

**MEMORANDUM DECISION ON TRUSTEE’S MOTION
TO DISTRIBUTE THE REMAINING ASSETS
OF THE ESTATE AND CLOSE THE CASE**

The pending motion represents the latest attempt by the trustee, Richard Emery, to bring this case to conclusion. In response, William S. Ellis, Jr., an alleged creditor and party in interest, has redoubled his efforts to continue the litigation for litigation’s sake. Mr. Ellis’ efforts will be partly successful; because of his conduct, it is impossible to close this case at this time. It is possible, however, to conclude some matters and distribute some money to creditors.

The history of the debtor, this case, and the trustee’s efforts to impose order on the chaos created by Mr. Ellis’ antics are recounted in the Findings of Fact and Conclusions of Law Regarding Payment of Fees and Expenses To Trustee and His Counsel under 11 U.S.C. § 506(c), filed on February 13, 2004,¹ and will not be

¹The district court and the Ninth Circuit court of appeals have affirmed the order based on those findings and conclusions.

repeated here. Suffice it to say that Mr. Ellis was not deterred and has continued to litigate every issue in this case and appeal from all (or nearly all) of the court's orders. There is no reason to doubt that Mr. Ellis will continue this course of conduct as long as he is able to do so. As Mr. Ellis said at the hearing on the pending motion:

There's no basis in law for what [the trustee is] trying to do and so for as long as I can resist it I will. It's not – and I told Mr. Hosoda the other day, and he's quoting me, but basically I said I've got nothing to lose. I've been ripped off my life savings, basically two million from me, three million from my partners, and nothing to lose. And I believe I'm here on this earth to persist in this matter. There's never been anybody like me and hopefully there's nobody like me again. But this is my mission in life. You can slap me around, call me vexatious or whatever

The trustee's motion² seeks various relief, all of which is necessary to conclude this case. Specifically, the trustee seeks authority to establish a reserve to fund future administrative expenses and distribute the remaining assets of the estate to creditors pro rata. In order to reduce the risk that further litigation by Mr. Ellis will deplete the administrative fund, the trustee seeks a determination that Mr. Ellis lacks standing, that any claims he might hold should be equitably

²Trustee Richard Emery's Motion to Distribute the Remaining Assets of the Estate and Close the Case, filed on July 5, 2005. The motion was heard on August 15, 2005. At the hearing, Lyle Hosoda and Raina Meade appeared for the trustee, Christian Porter appeared for the "Long group" of unsecured creditors, Mr. Ellis appeared on his own behalf, Robert Matsumoto appeared for certain limited partners of Kula-Olinda Associates, Curtis Ching appeared for the Office of the U.S. Trustee, and David Farmer appeared for P.F. 3 Partners.

subordinated, and that Mr. Ellis is a vexatious litigant, and that the court prevent Mr. Ellis from filing any papers at all, or, at a minimum, permitting him to file pleadings only with leave of court. Finally, the trustee requests that the court close the case.

As usual, Mr. Ellis objects to the motion on a variety of grounds.³

First, Mr. Ellis objects to some of these requests on the ground that they are set forth in the memorandum in support of the motion, rather than in the motion itself. Mr. Ellis argues that this violates Fed. R. Bankr. P. 9013, which provides that “the motion shall state with particularity the grounds therefore, and shall set forth the relief or order sought.” In this case, the trustee filed (as is customary) a motion and a supporting memorandum. When a party proceeds in the usual fashion, the “motion” for purposes of rule 9013 consists, not just of the paper entitled “motion,” but rather of all of the moving papers, including any memorandum served contemporaneously with the motion. Mr. Ellis’ hypertechnical contention cannot survive the fundamental command of Fed. R. Bankr. P. 1001. Mr. Ellis also argues that putting the specific requests for relief in a paper called a “memorandum,” rather than in a paper called a “motion,” has

³Most of Mr. Ellis’ objections were filed tardily, after the hearing on the motion. Mr. Ellis’ unexcused failure to submit these objections in a timely fashion is an independently sufficient reason to overrule them. I will address them on the merits strictly out of an abundance of caution.

deprived him of constitutional due process. This objection is frivolous. Due process requires adequate notice. Mr. Ellis had no difficulty in discerning the relief which the trustee seeks. There is no due process violation.

Second, Mr. Ellis contends that the request for a distribution should be denied on the ground that, in a chapter 11 case, distributions should only be made pursuant to a confirmed plan, absent extraordinary circumstances. In re AirBeds, Inc., 92 B.R. 419, 422 (B.A.P. 9th Cir. 1988). If the circumstances of this case are not extraordinary, then I can not imagine what set of circumstances would be extraordinary. Requiring the trustee to propose a plan would serve no useful purpose. The plan litigation process would only gratify Mr. Ellis' desires to litigate for the sake of litigating and to inflict financial suffering on all of his perceived adversaries.

According to a schedule which the trustee distributed at the hearing, the trustee held \$263,484.74 as of June 30, 2005. He estimates that the administrative expenses accrued and unpaid at that date were about \$35,635.34. He wishes to establish a \$47,000 reserve⁴ to cover future administrative expenses. He also wishes to establish an additional reserve in an amount equal to the full face

⁴The motion suggested a reserve of \$10,000 for future legal fees, \$3,000 for future trustee's fees, and \$3,000 for future accounting fees. Prior to the hearing, the trustee decided (in light of the position of the Office of the U.S. Trustee) that the case could not be closed at this time. Therefore, the trustee increased the proposed reserve for future administrative expenses.

amount of all disputed claims This leaves \$80,745.01 for distribution to undisputed unsecured creditors.

Numerous claims objections have been filed and litigated to judgment or settlement in this case. All of the remaining allowed claims are general unsecured claims; all secured and priority claims have been paid, disallowed, or reclassified. The establishment of a reserve for the remaining disputed claims is appropriate. Therefore, the trustee should be authorized a pro rata distribution of the available funds to the holders of allowed claims.

There are disputes concerning ownership of some of the claims. For example, certain limited partners of Kula-Olinda Associates contend that they, rather than Mr. Ellis, are the true holders of certain claims. If the trustee is unable to determine to his satisfaction who is entitled to receive distribution in respect of a particular claim, the trustee may commence an interpleader action in a court of appropriate jurisdiction so that the dispute can be resolved at the least possible expense to the estate.

The trustee's motion asked the court to close the case. In the meantime, the trustee realized that, due to Mr. Ellis' persistent litigation, closing the case is not possible. Therefore, the trustee withdrew this request.

The remainder of the trustee's motion consists of requests for relief

based on Mr. Ellis' misconduct in this case. Mr. Ellis does not respond to any of these requests on the merits. Instead, he makes two procedural arguments.

First, Mr. Ellis argues that res judicata bars the requests. Mr. Ellis correctly points out that the court has faced similar requests for relief against Mr. Ellis on two prior occasions. First, Richard Ferguson (another creditor) filed a motion seeking similar relief against Mr. Ellis on May 26, 2000 (docket no. 835). It appears that, due to changes in the circumstances of the case, that motion was abandoned and not decided. Only judgments have preclusive effect; the absence of a judgment is not res judicata. Second, the trustee filed a similar motion on July 29, 2003 (docket no. 2538). The court denied this motion on the grounds that it sought injunctive relief which, pursuant to Fed. R. Bankr. P. 7001, must be sought in an adversary proceeding. This purely procedural disposition has no claim preclusive effect. Res judicata therefore is inapplicable.

Mr. Ellis also renews his argument that the trustee is requesting injunctive relief which may only be sought in an adversary proceeding. One could argue persuasively that sanctions are properly sought by way of a motion, even if they could be characterized as a claim to recover money or for injunctive relief. See In re Gaudet, 146 B.R. 323 (Bankr. D.R.I. 1992). Out of an abundance of caution, however, it is best to avoid possible procedural infirmities. Therefore, I

will deny this aspect of the trustee's motion. Because the trustee's objections to Mr. Ellis' conduct and motives appear to be well founded, however, I will enter a separate order directing Mr. Ellis to show cause why he should not be sanctioned.



/s/ Robert J. Faris

United States Bankruptcy Judge

Dated: 10/05/2005